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In the United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Appellant,

vs.

CHARLES A. COLE,

Appellee.

(TWO CASES)

BRIEF OF APPELLEE.

Upon Appeal from the District Court of the United States for the District of Oregon.

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INDEX TO AUTHORITIES.

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STATEMENT OF THE CASES.

These two actions, which were consolidated, both in the trial court and in this court, were brought by plaintiff, the father of two minor girls of the ages of

eighteen and eight years, to recover damages for the loss of services on account of the death of said minor daughters, as a result of a collision between an automobile in which they were riding and a gasoline motor car operated by the defendant along its main line near Underwood, Washington.

These cases arose from the same accident which was involved in the case of *Spokane, Portland and Seattle Railway Company vs. Cecile S. Cole,* 40 *Fed.* (*2nd*) 172, decided by this Court on April 30, 1930, and in which case this Court affirmed a judgment recovered against the defendant Railway Company by the mother of plaintiff's decedents.

In the instant case the complaint contained the following allegations not found in the *Cecile S. Cole* case:

> "(c) That the said defendant carelessly and negligently maintained its right of way at and near said crossing in a dangerous condition, in that the defendant permitted unnecessary obstructions upon its right of way at or near said crossing so as to obstruct the view thereat, both of its servants approaching said crossing on a train and of persons upon said highway, in that the defendant allowed said right of way to become overgrown with bushes, weeds and grass so as to obstruct said view."

The first error assigned by the defendant is the failure of the trial court to give the following instruction:

> "I instruct you that the evidence is insufficient to show any negligence on the part of the defendant in the manner in which the crossing itself was maintained with respect to the view at the crossing

of train operators along the highway and of automobile operators along the railroad. **Consequently, all allegations of negligence with respect to obstruction of view and the maintenance of the crossing itself are withdrawn from your consideration** and you cannot base any recovery on any such allegations."

ARGUMENT.

In connection with appellant's assignment of error number one, it is submitted that this Court will not be compelled to go beyond a preliminary consideration in determining that it was not error to fail to give the requested instruction above set forth. In this connection it is not necessary to cite authority for the proposition that, if an instruction is subject to criticism or is erroneous in any particular, it is not error to fail to give the same. We will endeavor to demonstrate to the Court that the requested instruction now under consideration is erroneous in certain particulars and that, under the rule contended for, it was not error to fail to give the same.

From an inspection of Paragraph VIII of the complaint (Tr. 6), the Court will ascertain that there were allegations to the effect that the motor car operated by the defendant was traveling at an excessive rate of speed, and that the defendant failed to sound any warning or alarm of its approach. That there was evidence sufficient to support said allegations is

settled by this Court in the *Cecile S. Cole* case supra and is not questioned in any way by the defendant upon this appeal. Therefore, waiving for the purposes of this immediate discussion the question as to whether or not there existed a duty upon the part of the defendant relative to the obstructions which it permitted to exist upon its right of way, it is clear from a review of the authorities that the presence of said obstructions was a material circumstance to be considered by the jury in connection with the care required by the defendant in the operation of its trains at the point of the accident and that the above instruction which would have **entirely removed** these allegations relative to said obstructions **from the consideration of the jury** was entirely too broad and erroneous. In other words, this requested instruction, which we are now reviewing, conclusively and entirely eliminates the allegations of obstruction from the case for all purposes when, at the very least, said allegations and evidence in support thereof were relevant to be considered by the jury in conjunction with plaintiff's allegations of negligent speed and failure to give a warning. In support of our contention that the allegations with respect to the obstruction of view and the maintenance of the crossing at the very least were pertinent circumstances to be considered by the jury in connection with the manner in which the defendant operated its motor car, we cite the following from 22 *R. C. L.* 995, *Railroads*:

> "The rule obtaining in other jurisdictions is that the presence of unnecessary obstructions on the right of way, which may obscure the view, does

> not in itself establish negligence on the part of the company nor constitute an independent ground of recovery. **The fact of the existence of such obstructions may be considered, however, upon the question of the degree of care and vigilance which the company is bound to exercise in the running and management of its trains, and in giving warning of their approach.** And the same rule applies where the obstructions to view are necessary in the legitimate conduct of the business."
> (Emphasis ours).

We also refer the Court to the following statement found in 3 *Elliott on Railroads, Page* 531, *Section* 1656:

> "Where a crossing is unusually dangerous because the track is curved or the view obstructed, or because of its peculiar construction or situation, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires. Its duty to travelers upon the highway is to exercise reasonable care under the circumstances, and reasonable care in such cases may require it to exercise precautions not demanded in ordinary cases. This rule is especially applicable when the company itself causes the obstruction, as, for instance, where it has allowed weeds and trees to grow up on its right of way, or has piled up wood, or left cars in such a place that they obstruct the view."

In this connection, in the *Cecile S. Cole case supra,* and in the case of *Southern Pacific Company vs. Stephens,* 24 *Fed.* (2d) 182, this Court has held that speed may not of itself be found negligent by the jury except in view of the fact that warning or alarm was not sounded of the approach of a train. The contention here made is not different in principle, to wit: that the operation of the train in question,

both with respect to speed and failure to sound a warning or alarm of the approach, should be considered in the light of the existence of obstructions present upon the right of way of the defendant. It is, therefore, submitted that the requested instruction now being reviewed is erroneous in that it is too broad, because it removes all allegations with respect to the obstruction of view and the maintenance of the crossing from the consideration of the jury, when under the authorities above set forth, these were material circumstances to be considered upon the questions we have above referred to. We consequently believe that this instruction requested by the defendant is erroneous in the particulars we have above set forth and that it was not error to fail to give the same.

In support of the argument advanced by the defendant that plaintiff's decedents were licensees and that the defendant owed them no duty with respect to the obstructions which it permitted to exist upon its right of way, the defendant has cited decisions from outside circuits and certain state decisions. Although the particular question involved, as far as we are able to ascertain, has never been before this Court for determination, this Court has firmly adhered to the legal proposition that a railroad company owes the duty to a licensee to exercise reasonable care for his safety.

Northern Pacific Railway Co. v. Curtz, 196 *Fed.* 367, 368-369 (*C.C.A.* 9);
Northern Pacific Railway Co. v. Chervenak, 203 *Fed.* 884-885 (*C.C.A.* 9).

However, the appellant contends that this Court should not follow its prior decisions relative to the duty owing a licensee because the negligence now under consideration pertains to the condition of the crossing rather than to the operation of its trains. In support of this contention the appellant has cited certain cases wherein courts have held that there was no obligation upon a railroad company to remove obstructions from its crossings, among them being:

Johnson v. C.M. & St. P. Ry. Co., 96 *Minn.* 316, 104 *N.W.* 961;
Atlantic Coast Line R. Co. v. Carter, 214 *Ala.* 218 (*should be* 252), 107 *So.* 218.

However, it is submitted that these decisions and similar ones cited by the appellant are distinguishable because these were private crossings usually enclosed by fences and limited to the use of farmers whose property was adjacent to the railroad, and such limitation of use was known to the injured persons in most instances. However, in the instant case, the crossing was both built and maintained by the defendant itself (Tr. 21) and, connecting with a county road, was open to all members of the general public who had occasion to use the same. No signs were placed upon the right of way that permission to use the crossing was merely a matter of license revocable at any time. Defendant failed to introduce any written documents purporting merely to give a license to the

Bureau of Fisheries, but relied merely upon the oral testimony of the witness Hoffman to the effect that he believed the road was classed as a private road. It may be here stated that, to all intents and purposes, the road appeared to those using it the same as any public highway and that, if there were any limitations upon its use, they were secret and unknown to plaintiff's decedents and to others using the crossing which was maintained by the defendant. **Insofar as the general public was induced to believe,** if the road was a private road, it was private merely because of some secret agreement, and there was nothing in the way of signs, bars, gates or other means to inform and advise the general public that it was a private road. It is submitted that, under the facts and circumstances, existent in the instant case, and particularly the conduct of the defendant in building and maintaining a crossing, and the free use of the crossing by members of the public, under the best reasoned and by what we believe to be the weight of authority, the use of the highway by the plaintiff's decedents partook of the nature of an invitation rather than that of a bare license, and that consequently the defendant company was under obligation to use ordinary care to keep the crossing free from danger. We freely concede that, where a railway company does no more than to suffer or permit a person to cross the tracks or to use the tracks, the rule of invitation does not apply. However, in the light of the record in the instant case, it is submitted that the rule applicable is the one announced in 3 *Elliott on Railroads* 497-499:

"If, however, the traveler uses a place as a cross-

ing by invitation of the company, it must use ordinary care to prevent injury to him, as, where the company **constructs a grade crossing and holds it out to the public as a suitable place to cross.** Where by fencing off a foot way over its tracks it induces the public to so use it, by building to the track plank bridges for foot passengers, or by constructing gates in the railroad fence for the use of pedestrians who habitually cross the track, it thereby **holds out the place as proper for them to use.** Such invitation as imposes on the company the duty of ordinary care is implied, where **by some act or designation of the company persons are led to believe that a way was intended to be used by travelers or others having lawful occasion to go that way, and the company is under obligation to use ordinary care to keep it free from danger.** There is much conflict of authority as to what constitutes such a general use of a place as a crossing or such recognition of the right to use such a place as will impose upon the company the duty of observing the precaution required at public crossings, but we think the doctrine we have expressed is the **true one supported by the best reasoned cases and by the recognized principles of law."**

(Emphasis ours.)

One of the very cases cited by the appellant at page twenty of its brief, to wit: *Bryant v. Missouri Pacific Railway Company,* 181 *Mo. App.* 194, recognizes the rule here contended for. In that case, the plaintiff, a farm laborer, sued to recover for injuries while moving a hay bailer over a private farm railroad crossing. As a result of the condition of the crossing plaintiff was injured. It was held in that case that the Court committed error in not allowing the plaintiff to prove that by use the crossing had been open to the public

and consequently the plaintiff in using it was entitled to a reasonably safe crossing. The Court held as follows, at page 194:

> "If the company had been **recognizing the farm crossing as a public crossing and the public had been using it as such,** the company **owed the public the duty of maintaining it in a reasonably safe condition,** but as to a farm crossing not so used, the company would owe no duty to maintain it in repair to anyone but the owner of the farm, his family and servants." (Emphasis ours).

The instant case comes squarely within the rule above announced in view of the fact that the crossing in question had been recognized by the defendant as a public crossing and the public had been using it as such. And here we emphasize a very important matter which we request the Court to bear in mind in connection with the above and following citations, to wit: That, at the very most, the defendant was only entitled to have the matter submitted as a jury question as to whether or not the plaintiff was using the crossing under the invitation or inducement of the defendant within the rule above announced which would require the defendant to exercise reasonable care in its maintenance, rather than as a bare licensee, which fact under some of the authorities would not entitle the plaintiff's decedents to any degree of care on the part of the defendant relative to the maintenance of the crossing. In other words, the force and effect of the requested instruction now under consideration is to have the Court **positively declare, as a matter of law, the exact status of the plaintiff,** when under the authorities above cited and to be cited, and

under the record in the instant cause, relative to the crossing and its use it is submitted that, at the very least, this Court is not in a position to declare, **as a matter of law,** that the status of plaintiff's decedents was such that the defendant owed no duty to them relative to the condition of the crossing. If there is room for the suggestion that different inferences might be drawn as to the rights of the plaintiff's decedents and the duties of the defendant, that matter should have been submitted to the jury under proper instructions, and in the light of the instant record, no court would be justified in declaring as a matter of law as the rejected instruction would require that the defendant owed no duty to the plaintiff in connection with the specification of negligence now under consideration.

In other words, the sole question before the court is whether or not it was error to fail to give defendant's requested instruction now being reviewed. There is no question involved here as to whether or not the jury might under proper instructions have decided, **as a matter of fact,** that the crossing was not one held out or treated as a public crossing, or one where the defendant by its conduct did not invite a public use thereof. However, the defendant by its requested instruction now asks this court to declare, **as a matter of law,** irrespective of the record and the decisions, that the status of plaintiff's decedents was such that the defendant owed them absolutely no duty with respect to the condition of the crossing.

In support of the proposition we are here con-

tending for, that is that the plaintiff's decedents were using the crossing as a matter of invitation, we refer the Court to the case of *Murphy v. Boston Ry. Co.,* 133 *Mass.* 121, 124-125. The facts in this case were that the injury occurred at a private crossing which had been maintained by the defendant. The plaintiff was a pupil at a public school and had occasion to cross the tracks on the way to school. The Court held that since there was evidence from which the jury could find that the defendant held out the crossing as a suitable place for foot passengers to cross, that the plaintiff may be said to have attempted to cross by inducement or invitation of the defendant, and the recovery was upheld.

Also see the following cases:

Hanks v. Boston & Albany Ry. Co., 147 *Mass.* 495, 498-499. 18 *N. E.* 218.
Pomponio v. N. Y. Ry. Co. 66 *Conn.* 528, 540.

In the recent Federal case of *St. Louis-San Francisco Ry. Co. v. Ready,* 15 *Fed.* (2d) 370, the declaration alleged that the crossing was put in and maintained by the defendant railway company. The evidence showed that, although the crossing was not a public crossing, it had been established and kept up by the defendant, and that the custom had been observed of giving warnings of approach (in this case, the evidence of the defendant's motorman was that he always blew the whistle at this crossing). The evidence failed to show that the crossing was frequently used. In affirming the case, Judge Bryan of the Circuit Court of Appeals for the Fifth Circuit held as

follows:

> "The sole question is whether defendant owed any duty to a person using the railroad crossing. Ready was not a trespasser or licensee, but an invitee. He had a right to be where he was, and it was the duty of the railroad company to give reasonable notice and warning of the approach of its train. Evidence of the frequency of use of a private crossing put in by others than the railroad company affected is material to show that such railroad company had notice and acquiesced in the use; but **where, as here, a railroad company itself establishes the crossing, it has notice and knowledge of existing conditions, and is bound to use reasonable care to keep from injuring any persons,** whether few or many, who may have occasion to use such crossing. Walker v. Alabama, etc. R. Co., 194 Ala. 360, 70 So. 125; Shearman & Redfield on Negligence, §464."
>
> (Emphasis ours).

It will be noted in all the cases we have referred to that the courts lay greater stress on the **conduct** of the railway companies in constructing and maintaining crossings and the manner in which the same are **held out to the public** than to the unknown and secret arrangements made between the railway company and third parties. We submit that this distinction is a just and reasonable one.

Although applied to a different state of facts, we submit that the observation of this Court in the case of *Northern Pacific Ry. Co. v. Curtz,* 196 *Fed.* 367, 369, is pertinent and should be controling in the instant controversy:

> "The occupant or owner of premises who in-

> vites, either expressly or impliedly, others to come upon them, owes to them the duty of using reasonable and ordinary diligence to the end that they be not necessarily or unreasonably exposed to danger; and an implied invitation to another to enter upon or occupy premises arises from the **conduct of the parties**, and from the owner's **knowledge**, actual or imputed, that the general use of his premises has given rise to the belief on the part of the users thereof that he consents thereto." (Emphasis ours).

Counsel for appellant, at page twelve of their brief, quote from Elliott on Roads and Streets, (2nd Ed.) Section 1019, emphasizing the same as follows:

> "Unless the company has done something to allure or invite travelers to cross, or has in some manner treated it as a public crossing, we are inclined to think the better rule is that they are, **at the most, mere licensees** to whom no duty of active vigilance is ordinarily due. Mere permission or passive acquiescense under ordinary circumstances does not constitute an invitation."

We concur in the soundness of this citation. However, we change the emphasis to the following:

> "Unless the company has done something to allure or invite travelers to cross, **or has in some manner treated it as a public crossing,** we are inclined to think the better rule is that they are, at the most, mere licensees to whom no duty of active vigilance is ordinarily due. Mere permission or passive acquiescence under ordinary circumstances does not constitute an invitation."

In the case of *Johnson v. C. M. & St. P. Ry. Co.*, 96 *Minn.* 316, which is cited and relied upon by the defendant, the railway company had constructed a

private farm crossing, and it was held that, since the crossing was constructed only for the use and benefit of the owner of the farm, "there is no question but that the company was under obligation to keep and maintain it in good condition for use * * * * *" In the Johnson case there was no indication that the crossing was for the use of the general public because it was fenced and led only to the farm mentioned. Therefore, there was no duty owing to the general public because the defendant by its conduct had not led the general public to believe that the crossing was for its use.

Defendant also relies upon the case of *Atlantic Coast Line Co. v. Carter,* 214 *Ala.* 252. That this case is not in point is clear from the following statement of the court, at page 254:

> "But the evidence fairly construed affords no reasonable basis for the inference of an invitation to the general public to cross at that place (a plantation crossing). The defendant did nothing to hold the crossing out to the public as a suitable place to cross; on the contrary, its contract with the land owner definitely excluded the idea of public right."

Furthermore, the case was decided upon a line of reasoning contrary to every decision of the Ninth Circuit of Appeals, namely: that the only duty owing to a licensee is to refrain from injuring him after becoming aware of his presence.

Appellant at pages twelve and thirteen of its brief quotes 45 *Corpus Juris* 798 to the effect that a mere licensee assumes all the risks incident to not only the

condition of the property by the **manner of the conduct of the owner's business thereon.** This has never been the law in this circuit.

Northern Pacific Railway Co. v. Curtz 196 *Fed.* 367, 368-369 (*C.C.A.* 9):
Northern Pacific Railway Co. v. Chervenak, 203 *Fed.* 884-885 (*C.C.A.* 9).

Upholding the general rule we are contending for are the following cases:

Connell v. Electric Ry. Co., 131 *Ia.* 622, 626; 109 *N. W.* 177.
St. Louis Railway Company v. Dooly, 92 *S. W.* 789; 77 *Ark.* 561.
St. Louis Railway Co. v. Simons, 76 *N.E.* 883 (*Ind.*)

The courts have held that negligence may consist in allowing obstructions upon the right of way, of a railroad such as was disclosed by the record in this case.

St. Louis-San Francisco Ry. Co. v. Simmons, 242 *Pac.* (*Okla.*) 151, 152;
Corley v. Atchison, T. & S. F. Ry. Co., 133 *Pac.* (*Kan.*) 555, 556;
Burzio v. Joplin & P. Ry. Co., 171 *Pac.* (*Kan.*) 351, 353-354.

No question is raised by the defendant, if the duty existed to maintain the crossing, that there was not sufficient evidence of negligence relative to the obstructions which the defendant permitted to exist upon its right of way. In fact, the defendant itself recognized that the obstructions were of a dangerous char-

acter because the **very day following the occurrence of the accident the section crew of the defendant removed the obstructions complained of** (Tr. 24).

To summarize, it is submitted that the refusal to give the requested instruction under discussion was not error for the following reasons:

1. That the instruction was erroneous in that it was too broad and removed from the consideration of the jury allegations that at all events were relevant in connection with other charges of negligence;

2. That, under the weight of and the best reasoned authorities, plaintiff's status was that of an invitee because the conduct of the defendant in constructing and maintaining the crossing, together with other facts heretofore pointed out, rendered the plaintiffs' use of the crossing one of invitation;

3. That at the very least this Court would not be in a position to declare, as a matter of law, as the requested instruction would require, that the status of plaintiff's decedents was such that the defendant owed them no duty insofar as the condition of the crossing was concerned, it being at the very least a question of fact which should have been submitted to the jury under proper instructions, as to the status of the plaintiff's decedents and the corelative duty and obligation of the defendant.

ANSWER TO ASSIGNMENTS OF ERROR II AND III.

Under these assignments of error, the defendant complains of the ruling of the Trial Court denying its motion for a new trial on the ground that the amounts of the verdicts were excessive, and appeared to have been given under the influence of passion and prejudice.

ARGUMENT.

The rule is well established in the Federal Courts that the denial of a motion for a new trial is discretionary with the Trial Court and will not be reviewed upon appeal.

The United States Supreme Court has so held in *Pittsburgh, Cincinnati and St. Louis Railway Company v. Heck,* 26 *L. Ed.* (*U.S.*) 58, where Chief Justice Waite states the rule as follows:

> "We have uniformly held that, as a motion for new trial in the Courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here."

Likewise it has been held in other circuits that the denial of the motion for a new trial on the ground of the excessiveness of the verdict is not reviewable upon repeal. In such instances the denial of the motion for a new trial is discretionary, and therefore not reviewable. In this connection we refer the Court

to *Chesapeake O. Ry. Co. v. Proffitt,* 218 *Fed.* 23, 28, where the rule is thus stated:

> "(2) It is further insisted that the court erred in denying a motion to set aside the verdict, based upon the ground that it was excessive. In the case of North Pacific R. R. Co. v. Charless, 51 Fed. 562, 2 C.C.A. 380, syllabus 7, is in the following language:
>
> **'The correction of an excessive verdict is a question for the trial court on a motion for a new trial, the granting or refusing of which will not be reviewed by the federal appellate courts.'**
>
> The cases of Erie R. R. Co. v. Winter, 143 U. S. 61, 12 Sup. Ct. 356, 36 L. Ed. 71, and of Fitch v. Huff, 218 Fed. 17, 134 C.C.A. 31, decided at this term of the court, and the cases cited therein, are to the same effect."

To the same effect is *Yellow Cab Co. v. Earle,* 275 *Fed.* 928 (*C.C.A.* 8) (*certiorari denied in* 42 *Sup. Ct.* 317):

> (1) The second, third, and fourth specifications are that the court erred in denying the motion of the defendant to set aside the verdict and grant a new trial (a) on the ground that it was not justified by the evidence; (b) on the ground that it was contrary to law; and (c) on the ground that the damages were excessive and appeared to have been given under the influence of passion and prejudice. But as the denial of a motion to set aside a verdict and grant a new trial on either of these grounds is discretionary with the trial court, and not reviewable on a writ of error in a federal appellate court, these specifications are futile. Chicago, M. & St. P. Ry. v. Heil, 154 Fed. 626, 629, 83 C.C.A. 400."

This Court has likewise held that motions for a new trial are not reviewable upon appeal.

In *American Trading Co. v. North Alaska Salmon Co.* (*9th Circuit*), 248 *Fed.* 665, in which certiorari was denied, in 38 *Sup. Ct.* 581, 247 *U.S.* 518, 62 *L. Ed.* 1245, Judge Gilbert stated as follows, at page 670 of the decision:

> "(6) It is suggested that the court below erred in not setting aside the verdict and ordering a new trial. **It is well settled that in the United States courts the refusal of the trial judge to set aside a verdict or grant a new trial is not subject to review.** In Great Northern Ry. Co. v. McLaughlin, 70 Fed. 669, 17 C.C.A. 330, we held that a court of error cannot review evidence to determine the correctness of a verdict, saying:
>
> 'The relief from such mistakes if any are made, is to be sought in applications to the trial court for a new trial.'
>
> ——and citing Mills v. Smith, 8 Wall 32, 19 L. Ed. 346, where the court said:
>
> 'This court have no right to order a new trial because they may believe that the jury may have erred in their verdict on the facts. If the court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this court for any supposed mistake of the jury.'
>
> We find no error. The judgment is affirmed." (Emphasis ours).

In the recent Ninth Circuit case of *First National Bank of San Rafael v. Philippine Refining Corporation,* 51 *Fed.* (*2d*) 218, *decided July* 13, 1931, the question of the sufficiency of the evidence to support a judgment was not raised during the trial but by motions made after trial. Judge Wilbur stated on page 221.

> "It is fundamental that the exercise of the discretion of the trial court is not subject to review on appeal, so that the ruling of the trial court in denying or granting such a motion made after a judgment cannot be reviewed."

Thus the rule is conclusively established under the above authorities that a motion for a new trial is discretionary with the Trial Court, and the denial of the same cannot be considered upon an appeal. In this connection we desire to call to the Court's attention that the denial of defendant's motion for a new trial is the only way in which the defendant has attempted to bring to this Court for review the alleged excessiveness of the verdicts, and since this matter is not properly one for review, it is submitted there is nothing for this Court to pass upon as far as these two assignments of error are concerned.

However, even if the alleged excessiveness of the verdicts were properly before this Court for review, under well established principles of law the verdicts in the instant causes could not be considered as excessive.

The instant cases are based upon the statutes of the State of Washington giving right of action to the surviving parent in the event of the injury or death of his minor children. Therefore, the decisions of the Supreme Court of the State of Washington interpreting these statutes are controling in the instant controversies. We will, therefore, demonstrate that, under

the Washington decisions, the verdicts in the cases now before this Court could in no event be considered as excessive. Under Specification of Error Number II, it is asserted that the allowance of the sum of $2500 for the loss of services of Jacqueline A. Cole, the eight year old daughter of the plaintiff, was excessive and indicated passion or prejudice on the part of the jury. That such a contention is untenable is settled by the Supreme Court of Washington in the case of *Sasse v. Hale Morton Taxi & Auto Co. et al,* 139 *Wash.* 356, 246 *Pac.* 940. In this case a father recovered the sum of $3833.50 in addition to $575 actual expenses connected with the death of his nine year old daughter. The Supreme Court held as follows, at page 361:

> "There is not nor can there be any fixed standard by which damages in cases of this sort can be ascertained and allowed, in the absence of legislative expression. In 1906 in the case of Abby v. Wood, 43 Wash. 379, 86 P. 558, a verdict for $2,160.20 was approved for the wrongful death of a child one year of age. In 1916, in the case of Kranzusch v. Trustee Co., 93 Wash. 629, 161 P. 492, a verdict for $3,576 was held not to be excessive for the wrongful death of a son four years of age, in the absence of an affirmative showing of passion or prejudice. In the present case the evidence shows that the deceased child was of robust health and that, 'as understood by everybody, her intelligence and capacity generally was above that of the average child of her age.' **There is in the case no affirmative showing of passion or prejudice. It cannot be inferred from the amount of the verdict.** Sherrill v. Olympic Ice Cream Co., 135 Wash. 99, 237 P. 14." (Emphasis ours).

The case of *Atkeson v. Jackson Estate, 72 Wash.* 233, 240-241, 130 *Pac.* 102, 105, deals with the necessity for actual proof of earnings or future earning capacity in cases such as the one now before the Court. In this action the minor daughter of well-to-do parents was killed, and it was the contention of the defendants that plaintiff was entitled only to nominal damages since, because of the parents' financial status, the daughter during her minority would probably be a financial detriment to her parents rather than an asset. In sustaining a substantical verdict in favor of the plaintiff, the Court held as follows:

> "It is argued that, since a girl in this state reaches the age of majority at her eighteenth birthday, and since statistics show that the average age of girls who graduate from the high schools in the state of Washington is in excess of 18 years, it is idle to say that a girl so graduating prior to that age has an earning capacity in excess of her cost of maintenance; that every father, who has reared a girl to that age and given her an education equivalent to that of graduation from the state high school, knows that the cost of her maintenance must, of necessity, exceed her earning capacity; and that any different claim is pure fiction.
>
> But this reasoning does not seem to us to be controlling. It may be that, had the daughter reached her majority, and had the respondents maintained their present financial condition and carried out their expectations concerning her, the expense of her care, nurture, and education would have exceeded her earnings on their behalf. But, since adversity and misfortune are sometimes the accompaniments of life, as well as prosperity and success, there is another side to the picture. It is possible that the respondents may lose the property

> they have accumulated, and at the same time their health and ability to earn money. If such a misfortune should befall them, might it not be said that the daughter's earnings, had she lived, would have greatly exceeded her cost of maintenance? And who shall say that such a misfortune may not befall them? And if the probability exists, why may not a recovery be based thereon? There is, of course, no certain measure of damages in cases of this character; but, notwithstanding this difficulty, the great weight of authority is that a substantial recovery may be had.
>
> * * * * * * * * *
>
> (5) On another principle, also, there can be a substantial recovery in this case. Where the child killed is of tender years, proof of special pecuniary damages is not necessary to maintain the action or warrant a recovery for more than nomial damages."

The cases heretofore cited are just as applicable in answer to appellant's Specification of Error No. III, which complains of the excessiveness of the verdict of $2000.00 for loss of services of plaintiff's eighteen year old daughter. Furthermore, we desire to point out to the Court a factor which has apparently been overlooked by the defendant, that is that the measure of damages is the value of the child's services from the time of death until she would have attained the age of majority (twenty-one years), less the cost of her support and maintenance. This measure, although necessarily a pecuniary one, does not mean the jury is limited to a consideration of what the child would have earned if put to **outside** labor. In this connection, under a similar state of facts, the Missouri court held,

in *Lindstrom v. Peper,* 203 *Mo. App.* 278, 291, as follows:

> " 'The probable money value of the child's services,' however, is not solely tested by what he might earn if put to outside labor."

Counsel for appellant have endeavored to demonstrate by mathematics that the verdicts in the instant cases are excessive, but in this connection they failed to take into consideration the value of the child's services to the home and the possible fact that the child might have secured other employment during the remainder of her period of minority. During the apple picking season, the eighteen year old daughter was employed at the rate of $3.50 per day. The jury had the right to take into consideration the fact that the value of her services would be the same whether working at home or at some outside occupation. Under such circumstances it is clear that a verdict of $2000.00 could in no event be held to be excessive.

It is submitted that not only are the instant verdicts not excessive, but on the contrary we believe they are very moderate.

We submit this case to the Court with the firm conviction that no reversible error is present in the record and that the judgments appealed from should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.